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No. 77-166

# In the Supreme Court of the United States

OCTOBER TERM, 1977

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ANDREW SCHEPICI, JOSEPH MASTRULLO,
JOHN BRADANESE, and
CHARLES PALAZZOLO, PETITIONERS

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 560 F. 2d 448.

## JURISDICTION

The judgment of the court of appeals was entered on June 30, 1977. The petition for a writ of certiorari was filed on July 29, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether the applications for orders authorizing electronic surveillance sufficiently established that other investigative methods were inadequate.

## STATEMENT

Following a non-jury trial in the United States District Court for the District of Massachusetts, petitioners were convicted of conducting an illegal gambling business in violation of 18 U.S.C. 1955 and 2.[1] The court of appeals affirmed (Pet. App. A).

The evidence at trial consisted of a lengthy stipulation of facts and a transcript of telephone calls intercepted pursuant to judicially authorized electronic surveillance conducted on telephone lines used by petitioners Mastrullo, Bradanese, and Schepici and co-defendants Santarpio and Bruun.[2] This evidence demonstrated that petitioners together conducted a gambling enterprise doing business in excess of $2,000 per day (see, *e.g.*, Stipulation II, IV, V, and VIII). The primary bookmaking business was owned and managed by co-defendants Hurley and Santarpio (Stipulation I, II). Petitioners Schepici, Palazzolo, and Mastrullo conducted their own operations, in the course of which they exchanged information with and made and accepted wagers from each other and their co-defendants (Stipulation IV, VI, VIII). Petitioner Bradanese was an employee of Mastrullo and assisted him in the enterprise (Stipulation IX).

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[1]Petitioners received the following sentences: Schepici, two years' imprisonment, of which 18 months was suspended, and two years of probation during which he must pay a fine of $5,000; Palazzolo, two years' imprisonment, of which 21 months was suspended, and 21 months of probation during which he must pay a fine of $5,000; Mastrullo, one year's imprisonment, which was suspended, and two years of probation during which he must pay a fine of $3,000; Bradanese, one year's imprisonment, which was suspended, and two years of probation, during which he must pay a fine of $500 (C.A. App. 161B-161E). "C.A. App." refers to Volume I of the Appendix in the court of appeals, a copy of which we are lodging with the Clerk of this Court.

[2]There were three sets of monitored conversations: The first interception, over telephone lines used by Santarpio and Bruun, was pursuant to Order No. 74-303-G and was conducted from December 19, 1974 through January 5, 1975 (Stipulation A, II, III). The other interceptions were pursuant to Order No. 75-19-M and were conducted from January 18, 1975, through February 3, 1975, over telephone lines used by Mastrullo and Bradanese, and from January 21, 1975, through February 3, 1975, over lines used by Schepici (Stipulation A, VIII, IX, IV). Palazzolo was heard talking to Schepici (Stipulation VI).



Petitioners' sole contention (Pet. 5-12) is that the application for electronic surveillance did not show in sufficient detail that "other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous," as required by 18 U.S.C. 2518(1)(c). The supporting affidavits, however, belie this contention.

The requirements of 18 U.S.C. 2518 (1) (c) are satisfied if the application and its supporting affidavit, viewed in a practical and common sense fashion (S. Rep. No. 1097, 90th Cong., 2d Sess. 101 (1968)), provide a sufficient factual basis for the issuing authority to conclude that traditional investigative techniques will be inadequate to expose the full scope of the criminal activity under investigation or the identity of the participants therein. See *United States* v. *Kahn*, 415 U.S. 143, 153 n. 12; *United States* v. *Sklaroff*, 552 F. 2d 1156, 1159 (C.A. 5), petitions for certiorari pending, Nos. 77-164 and 77-169; *United States* v. *Turner*, 528 F. 2d 143, 152 (C.A. 9), certiorari denied *sub nom. Grimes* v. *United States*, 423 U.S. 996; *United States* v. *Robertson*, 504 F. 2d 289, 293 (C.A. 5), certiorari denied, 421 U.S. 913; *United States* v. *Brick*, 502 F. 2d 219, 224 (C.A. 8); *United States* v. *Scibelli*, 549 F. 2d 222, 226 (C.A. 1), certiorari denied, June 6, 1977 (No. 76-1212); *United States* v. *Armocida*, 515 F. 2d 29, 38 (C.A. 3), certiorari denied *sub nom. Gazal* v. *United States*, 423 U.S. 858. The applications in the present case provide such a factual basis.

In the affidavit accompanying the initial application, F.B.I. Agent Daly detailed the facts and circumstances surrounding the offense and the targets' participation.[3] The affidavit showed (C.A. App. 27-44) that the government's information up to that point derived from three months of visual surveillance, the use of three reliable informants, evidence seized (pursuant to a warrant) by state officers that implicated other members of the conspiracy, and state records that showed that at least five of the persons named by the informants had previously been convicted of gambling-related offenses. This cumulation of evidence, however, was not sufficient to insure that a violation of 18 U.S.C. 1955 could be proved at a trial, since the informants refused to testify out of fear for their personal safety (C.A. App. 42). While the visual surveillance supplied probable cause to believe that certain individuals were implicated, that surveillance could not provide evidence as to the bookmaking activities because they were carried on inside private homes (*id.* at 41). Moreover, in Agent Daly's experience, the use of search warrants would also be ineffective because gambling records often were sketchy, contained code names, and rarely established provable connections between all the participants in the illegal enterprise (*id.* at 41-42)—indeed, his experience was borne out in this particular case by the fact that after the seizure of evidence by state authorities only one individual was convicted (*id.* at 38-39). Finally, drawing on his four

[3]The initial application (C.A. App. 21) resulted in an order dated December 4, 1974, which was not implemented (Pet. App. 17). The affidavit supporting that order (C.A. App. 27-44) was incorporated by reference into the application for the December 19, 1974 order (C.A. App. 61), and both of the earlier affidavits were incorporated by reference into the final application (C.A. App. 89).



years' experience and involvement in over 100 gambling investigations, Agent Daly concluded that, because most of the activity occurred in private homes and by telephone, continued surveillance and other normal investigative techniques would be unsuccessful (C.A. App. 27, 41).

In the succeeding affidavits (C.A. App. 58-66, 87-99) Daly pointed out that in his experience persons engaged in illegal gambling frequently moved their base of operation in order to avoid detection, and that at least two suspects in this investigation had done so before. Daly also noted that the prior interception had revealed the involvement of other persons whose identities were as yet unknown to the government, and that continued electronic surveillance was necessary to establish the identities of these persons.

In sum, the facts detailed in the affidavits showed that alternate investigative procedures were first attempted and found to be ineffective. As the court of appeals correctly noted (Pet. App. 20-21 n. 4), the government was not required to offer the informants immunity or protective custody as an incentive for them to testify. Nor was it required to explain its failure to utilize other possible procedures. "[T]he purpose of the requirement in section 2518(1)(c) is not to foreclose electronic surveillance until every other imaginable method of investigation has been unsuccessfully attempted." *United States* v. *Pacheco*, 489 F. 2d 554, 565 (C.A. 5), certiorari denied, 421 U.S. 909. See also *United States* v. *Smith*, 519 F. 2d 516, 518 (C.A. 9); *United States* v. *Kirk*, 534 F. 2d 1262, 1274 (C.A. 8), certiorari denied, June 27, 1977 (No. 75-7001). Here, normal investigatory methods were followed and found to be insufficient. Others were not attempted because it was the opinion of the agent, based on considerable experience, that no benefit would be derived therefrom. The statutory requirements were thus satisfied.

Petitioners allege, however, that the decision in this case conflicts with the Ninth Circuit's decisions in *United States* v. *Kalustian*, 529 F. 2d 585, and *United States* v. *Spagnuolo*, 549 F. 2d 705. Petitioners recognize (Pet. 10) that the decision below is consistent with the generally prevailing interpretation of 18 U.S.C. 2518(1)(c). We acknowledge that the *Kalustian* panel in the Ninth Circuit appears to have interpreted that Section to require somewhat greater specificity in the supporting affidavits than has been required by other courts. But that opinion does not represent the consistent view of that circuit,[4] nor does *Spagnuolo* require even greater specificity than *Kalustian*, as petitioners suggest (Pet. 11). Instead, the court in *Spagnuolo* recognized that its circuit's decisions in this area "often lead to results difficult to harmonize" and tried "to promulgate a manageable standard by which to judge affidavits under 2518(1)(c)." 549 F. 2d at 709-710. The standard it adopted is that "the affidavit, read in its entirety, must give a factual basis sufficient to show that ordinary investigative procedures have failed or will fail in the particular case at hand. * * * An affidavit composed solely of conclusions unsupported by particular facts gives no basis for a determination of compliance with section 2518(1)(c). *Kalustian* teaches no more than that." 549 F. 2d at 710. The Ninth Circuit standard as promulgated in *Spagnuolo* was clearly met here. Accordingly, even

[4]For example in *United States* v. *Pezzino*, 535 F. 2d 483 (C.A. 9), the Ninth Circuit held that an affidavit not unlike one here involved was sufficient. See also *United States* v. *Scully*, 546 F. 2d 255 (C.A. 9), certiorari denied, 430 U.S. 970; *United States* v. *Turner*, 528 F. 2d 143 (C.A. 9), certiorari denied *sub nom. Grimes* v. *United States*, 423 U.S. 996.



assuming that some conflict remains between the standard used in the Ninth Circuit and elsewhere,[5] this case does not directly present that issue.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[5]Since no other court of appeals has followed *Kalustian*, and since the Department of Justice has since *Kalustian* made efforts to conform its application to the stringent standards of that case (the present applications were submitted about a year before the *Kalustian* decision), we have not believed it justified to ask this Court to review those cases that we have lost in the Ninth Circuit on the basis of this issue. Moreover, this Court has, since the time of the *Kalustian* decision, declined numerous requests to review decisions from the Ninth Circuit and other circuits alleged to be in conflict with *Kalustian* (see, *e.g.*, *United States* v. *Scibelli*, 549 F. 2d 222 (C.A. 1), certiorari denied, June 6, 1977 (No. 76-1212); *United States* v. *Kirk*, *supra*; *United States* v. *Scully*, *supra*, and nothing has happened recently to justify any change in this Court's refusal to review what is, at heart, an intra-circuit conflict of little continuing importance. Cf. *Wisniewski* v. *United States*, 353 U.S. 901.